

# Chameleon Radio Corporation

Radio Station KFCC AM 1270

10865 Rockley Road Houston, Texas 77099

(281) 575-1270 fax (281) 879-1104

May 20, 1997

DOCKET FILE COPY ORIGINAL

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MAY 21 1997

FCC MAIL ROOM

Mr. William F. Caton, Acting Secretary  
Office of the Secretary, Room 222  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Reply Comments of Chameleon Radio Corporation to Proposed Findings of Fact  
and Conclusions of Law Filed by Mass Media Bureau in MM Docket 96-173

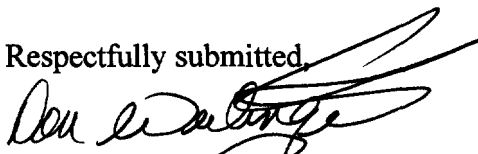
Dear Mr. Caton:

Transmitted herewith or an original and five (5) copies of the Reply Comments of  
Chameleon Radio Corporation to the Proposed Findings of Fact and Conclusions of Law  
of the Mass Media Bureau in the above cited case.

Please be made aware of the fact that under separate cover, copies of this  
document are this day being sent via Federal Express overnight courier to the offices of  
the Honorable Joseph Chachkin, Administrative Law Judge in this case, as well as the  
offices of Mr. Alan E. Aronowitz, esq., the counsel the Bureau in this case.

A copy of this document is also being made a part of the KFCC public inspection  
file.

Respectfully submitted,

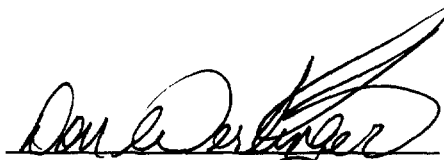


Don Werlinger, President  
Chameleon Radio Corporation

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing REPLY TO MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW has on this 20th day of May, 1997, been delivered via Federal Express Courier to the offices of Alan E. Aronowitz, Esq., Suite 8210, 2025 M Street, N.W., Washington D.C. 20554 and via Federal Express Courier to the offices of the Honorable Joseph Chachkin, Administrative Law Judge, Suite 226, 2000 L Street, N.W., Washington D.C. 20554. An additional copy of the above has been sent via Federal Express Courier to the offices of the Secretary, Federal Communications Commission, Second Floor, 1919 M Street, N.W., Washington, D.C. 20554.

  
Don Werlinger, President  
Chameleon Radio Corporation

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FCC MAIL ROOM

MAY 21 1997

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In Re

CHAMELEON RADIO CORPORATION )

Order to Show Cause Why the License of )  
Station KFCC (AM), Bay City, Texas )  
Should Not Be Revoked )

MM Docket No. 96-173

Request of Extension of Special )  
Temporary Authority )

To: The Honorable Joseph Chachkin  
Administrative Law Judge

REPLY COMMENTS OF  
CHAMELEON RADIO CORPORATION TO  
PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW FILED  
MASS MEDIA BUREAU

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Chameleon Radio Corporation, pro se  
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(281) 879-1104 Telecopier

May 20, 1997

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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MAY 21 1997

In re )  
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CHAMELEON RADIO CORPORATION )  
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Order to Show Cause Why the License of )  
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FCC MAIL ROOM

MM Docket No. 96-173

Before the Honorable Joseph Chachkin  
Administrative Law Judge

REPLY COMMENTS OF  
CHAMELEON RADIO CORPORATION TO  
PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW FILED BY  
MASS MEDIA BUREAU

1. With the filing of proposed findings of fact and conclusions of law ("PFCs") by both parties, the reply of Chameleon Radio Corporation ("Chameleon") to the PFCs of the Mass Media Bureau ("MMB") is contained herein.

2. The PFCs filed by Chameleon reflect our basic assessment of the record, related conclusions of law and legal argument. They will not be repeated here. This reply will be limited to addressing point by point, the proposed findings and conclusion filed by the Bureau with the intention of clarifying the record from our point of view.





### Chameleon's Reply to MMB's II. Proposed Findings of Fact

3. In its PFCs, the Mass Media Bureau ("MMB") notes that Chameleon sought FAA approval of tower construction at the Harris County site on March 28, 1995 which was before the April 6, 1995 notification of the termination of its time brokerage agreement by Salem Communications, the new licensee of KENR. The MMB alleges this is in conflict with other statements made by Chameleon. MMB PFC, p 4, par 8. This is not the case.

4. As is common practice in the broadcasting industry, Chameleon sought early FAA approval for tower construction on the site it intended to be KFCC's new site due to the occasional delays experienced obtaining such approval. In the instant case, regardless of whether or not an STA would be granted at the Harris County Site, Chameleon intended from the time it began negotiating (January/February, 1995) the purchase of the station that the site be KFCC's new transmitter site. In order that lack of FAA approval for antenna construction never be a hindrance to any kind of FCC approval, it was decided to file the necessary FAA form 7460-1 request with the FAA as early as possible. When it became necessary to seek an STA, just as it stated, Chameleon began looking for an STA site. Several sites were considered by Chameleon before eventually deciding on what it intended to be its permanently licensed site in Harris County at which to seek an STA. The statements are not contradictory. At the time the FAA request was filed, Chameleon did not know of the pending cancellation of its time brokerage agreement on KENR which in fact occurred as a complete surprise to Chameleon on April 6, 1995.

Once the decision was made in April to seek STA, of the several sites considered, the eventual proposed permanent site was determined to be the best potential STA site.

5. In its PFCs, the MMB states at paragraph 12 that the amended STA request failed to disclose that the original April 21, 1995 request contained incorrect coordinates for KFCC's authorized Bay City site, and that the amended STA request "on its face appeared to propose to use of an existing tower which was located at different coordinates than those provided in the April 21 STA request, rather than a newly constructed tower." MMB PFC, pp 6-7, par 12.

6. Chameleon did not correct the typographical error in its original April 21 STA request because it was unaware of the error until after the STA had been granted. When it reviewed the letter several days later, as explained in paragraph 9 below, it made Mr. Vu aware of the incorrect coordinates as well as several other errors.

7. With reference to the Commission's statement regarding the amended STA exhibit, it is correct that the amended STA request did propose the use of an existing tower which was located at different coordinates than those provided in the April 21 STA request. At the time of the amended request, the tower did exist, hence it was an existing tower and as discussed in Chameleon's PFCs and, under precedent set in both the Patton and WSAV, Inc. cases, was perfectly legitimate. Chameleon PFC, paragraphs 17-19, pp 5-7.

8. At MMB PFC paragraph 13, the MMB notes that the May 1995 letter granting Chameleon STA to operate from the Harris County site contains more than one error including the coordinates contained in the April 21 STA request and the notation that the



STA site was "0.24 km from KFCC's licensed site," in Bay City. The MMB alleges Chameleon never notified "Division" of the errors. This is not correct.

9. As stated in paragraph 6 above, when it received via telecopier on May 5, 1995, the May 5 Division letter granting STA, Chameleon immediately set about making alterations to the tower to accommodate the AM antenna which was then attached. This was done in order to commence operations from the STA site and prevent interruption of programming which had been carried on KENR. It was not until May 8, 1995 that Mr. Werlinger actually reviewed the STA grant letter in detail and noted several errors. Along with the errors noted by the MMB, the Division's letter also contained the following errors:

A. It granted authority for use of a "self-support, series excited, folded unipole 54.86 m (180') tower producing a an inverse distance field of 323.5 mV/m/kw."

This sentence alone contained two errors:

(i) The tower was not self-supporting. Nothing in any of the material filed or in verbal conversations between Mr. Werlinger and Mr. Vu ever suggested use of a self-supporting tower.

(ii) As stated in the STA request, a 180' antenna represents an antenna of  $83.65^\circ$  in electrical height on the frequency 1270 kHz. Such an antenna produces an inverse field of 306.4 mV/m/kw, not the 323.5 mV/m/kW stated in the Division's May 5 STA letter. The 323.5 mV/m/kW inverse field referenced in the letter is that produced by the licensed 76.2 m (250') non-directional antenna at Bay City.

B. The Division letter of May 5, 1995 also states, "this tower is one of the three existing towers (sic) array." Chameleon Exhibit I, appendice 5, at page 1. This is also incorrect. Obviously, Mr. Vu took language from the May 2 amendment,

misinterpreted it, and used it in the STA grant. However, a review of the May 2 amendment shows the following language from Mr. Werlinger, "The tower in our original proposal (the April 21,1995 STA request) *will be* (emphasis added) the center tower of what *will be* (emphasis added) a three tower array." The amended STA request goes on to state, "Again, we will have a form 301 to you *within* 30 days<sup>1</sup> of placing the STA on the air. All we need is time to take some readings off the STA site in order to properly design the pattern." Chameleon Ex I, appendix E, p 1.

10. Clearly, the language used in the May 2 amendment indicates Messrs. Werlinger and Vu had discussed the STA on numerous occasions. Clearly, Mr. Werlinger is not attempting to confuse Mr. Vu, but rather is attempting to reassure Mr. Vu of his intent to expeditiously put the STA on the air, take necessary field strength readings which would assist Mr. Werlinger in the design of what Mr. Werlinger *intended* to be a three tower array. These are all items which, through his experience in seeking and then operating STA's, Mr. Werlinger knew to be important considerations to Commission staff in such matters.

11. By telephone on May 9,1995, Mr. Werlinger notified Mr. Vu of the mistakes in the Division's letter of May 5. Included was a correction of the distance between the proposed STA site and that of the licensed site and verbal notification that the coordinates granted in the May 5 letter were not those of the amended STA request of May 2,1995. Although Mr. Vu stated a correction would be forthcoming, in its May 12,1995 letter

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<sup>1</sup> It should also be noted that even under the extreme pressures created later in the month of May, 1995 and continuing through the summer of that year, Mr. Werlinger was able to defend his position in the STA and complete and file the FCC form 301 seeking to make the site permanent, all within 90 days of the original grant of the STA.

altering the power authorized under STA, Mr. Vu corrected only the mistake in the coordinates of the granted STA. Chameleon Exhibit I, appendice 5, page 2.

12. Chameleon verbally reminded Mr. Vu of the remaining errors after receiving his May 12, 1995 letter reducing power on the STA to 300 watts days/50 watts night. Why he did not correct the other errors after the original telephone conversation on the matter only Mr. Vu can answer; however, given the number of errors and the repetition of those errors, at some point, Mr. Vu's competence must be questioned. Inasmuch as the MMB chose to broach the subject in its PFCs, now is an appropriate time.

13. As demonstrated in Chameleon's PFCs, Mr. Vu obviously didn't have a clear understanding of the Commission's policies regarding STA's, and as shown in both the MMB's PFCs and here, no fewer than five errors, were contained in Mr. Vu's letter of May 5. At least three of those errors were completely inexplicable and four of them were repeated in his letter of May 12. In fact to date, no one has explained why Mr. Vu, seeing that the erroneous set of coordinates mistakenly typed in the original April 21 STA request, did not see the obvious conflict and deal with it accordingly? The conflict in the coordinates of the two sites was graphically demonstrated two pages further in the STA request. Exhibit E-2 of the STA request was a wide area map including a distance scale which accurately showed both the licensed site and the proposed STA site, clearly indicating the two sites to be separated by a significant distance. The only conclusion a reviewing staff engineer could reach would be that an error had occurred on the part of the applicant in entering one set of coordinates or the other.

14. Mr. Vu's competence is further questioned in light of the fact that the STA request did not make reference to the specific efficiency of the antenna as described in inverse field, yet Mr. Vu's May 5 letter gave authority for an inverse field that the antenna being proposed could not attain. Coincidentally, the efficiency of the inverse field of the STA granted by Mr. Vu was exactly that of KFCC's non-directional daytime authorization at Bay City. Since no mention of antenna efficiency was made in the STA request, yet the efficiency stated in the letter granting STA exactly matched those of KFCC's licensed operation, the clear indication to be drawn here is that Mr. Vu did in fact check Commission records regarding KFCC's licensed operation. That being the case, several questions as to Mr. Vu's competence in this matter must be asked.

15. First, the data in the Commission's data base which contains the station's efficiency also contains data regarding coordinates. If Mr. Vu checked one piece of information as one would expect he would, why did he not bother to verify the coordinates in the data base at the same time? Why did he make the mistake as to inverse field? Why did he not recognize the error in coordinates contained in the STA request? The MMB would have one believe that Chameleon purposely inserted the error in an attempt to confuse the Division staff into thinking Chameleon was moving its site less than 1 km near Bay City. The truth is that, instead of typing the Bay City coordinates twice in paragraphs one and two of the April 21 STA request, Chameleon actually typed the coordinates of the Harris County site twice instead. The actual Bay City coordinates have been a matter of record in the Commission's data base for more than half a century

and a simple cross reference of the data base by Division staff would have revealed the error.

16. Obviously, Mr. Vu either did not understand or misinterpreted Werlinger's reference to what Chameleon intended to be a three tower array in the future. Why? Mr. Werlinger's language was clear and precise and demonstrates that not only was Mr. Werlinger not withholding information he felt would be of material interest to Mr. Vu, but was also attempting to anticipate matters which would be of interest to the Commission's staff in the case.

17. Unfortunately, what it boils down to at least in part, is the fact that in April, 1995, John Vu lacked sufficient proficiency in the English language to adequately communicate with STA applicants regarding their specific situations, a proficiency required by the position into which he had been placed. By its very nature, the position of determining the merits STA requests requires far greater interaction between applicant and staff than is required of a staff engineer the normal application process, the position Mr. Vu had previously held. Often, as in the case with KFCC, situations demand quick action and significant communication between applicant and the staff member making the determination. The numerous conversations between Mr. Werlinger and Mr. Vu were not only frustrating for Mr. Werlinger, but obviously for Mr. Vu as well. The two men simply had an extreme amount of difficulty in communicating with each other. Neither was to blame, they just couldn't understand each other. Mr. Vu may in fact, be a

competent engineer. He was; however, wrongly placed in a position where verbal proficiency in the English language is paramount to properly executing the job.<sup>2</sup>

Chameleon regards the language barrier as a very sensitive issue and has broached it with reluctance; however, it is an essential element in understanding the fact that Mr.

Werlinger was forthcoming with Mr. Vu. The communication barrier was a hurdle too great to overcome.

18. For its part, Chameleon has admitted a typographical error relating to the station's licensed coordinates in its April 21 STA request. Anyone can make a mistake and no one can demonstrate that the error mentioned above was anything other than that. However, it is abundantly clear the Commission's staff made errors as well. The MMB now attempts to force Chameleon to pay the ultimate price for its mistake and others alleged without admitting its own or attempting to determine their origin.

19. At MMB PFC, paragraph 17, page 10, the MMB cites the Division's letter of September 8, 1995 regarding "whether Chameleon was precluded from constructing at any other site by which it could maintain licensed service over Bay City..." This begs the question, would the Commission's staff, namely Mr. Vu, have allowed construction of a tower at some site other than the Harris County site? The apparent answer is, no. However, the use of the word *constructing* (emphasis added) would lead to the conclusion that the Commission did and does allow for construction of towers in STA

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<sup>2</sup> It is noted that subsequent to the controversy in the KFCC case, Mr. Vu was relieved of his duties in the AM Branch and reassigned to the Common Carrier Bureau.

situations. Which is it? Again, the MMB reserves for itself the option of doing things any way it wants.

20. Nonetheless, as made clear in virtually all its filings on the matter, Chameleon intended to seek a change in the city of license for KFCC. Using precedent established in a number of other STA's of which it had knowledge, Chameleon had no reason to believe that grant of the STA at the Harris County site would receive any other response than to be granted, as indeed it was on May 5, 1995.

21. At MMB PFC, paragraph 18, page 10, MMB states that extension of the STA as requested by Chameleon on August 1, 1995 would "clearly violate its (Division's) established policy." Chameleon's PFCs show there was no "clearly established policy" regarding this matter. Chameleon PFCs, paragraphs 16-19, pp 6-8. Division was in error when it denied extension of the STA in September, 1995 by virtue of the case (Patton Communications Corp., 48 RR 2d 349, 1980) it cited. The STA should have been renewed, especially in light of the fact that a form 301 request to make the STA site the permanently licensed site for KFCC had been filed in August and was at the time on an October 6, 1995 cutoff list. Staff did far more in the KVCi case in Mineola, Texas only six months later when it renewed an STA for KVCi after the station's form 301 had been returned as defective and before KVCi had submitted another form 301 to make its site permanent, this in full light of its actions taken in the KFCC case.

22. At MMB PFC, paragraph 22, page 13, the MMB notes that KFCC terminated operation from the Harris County site on September 5, 1996 and returned to its licensed

site in Bay City. Although the Court disallowed a letter from Landrum Enterprises, Inc.'s ("Landrum") successor in the sublease protesting Chameleon's move back to the site, it is noted that the move back to the Bay City site was and continues to be disputed by said successor.

23. At MMB PFC, paragraph 23, pp 13-14, MMB stated that "Werlinger also stated that there is nothing in Chameleon's agreement with Landrum Enterprises that would prevent Chameleon from utilizing the Bay City site." *This is not true.* Mr. Werlinger stated that the contract of sale did not contain the agreement for Chameleon to vacate the site, but the lease back agreement executed the same date the sale was consummated did. In fact, at the hearing Mr. Werlinger was very emphatic as to his understanding of Chameleon's loss of the transmitter site at Bay City. Under cross examination, Mr. Werlinger repeatedly stated his understanding of the lease back agreement with Landrum. Mr. Werlinger stated, "we negotiated the conditions under which we closed that sale, and contingent to that was the leaseback to Mr. Landrum. I don't know how else to state it." Tr. 121, 128-129.

24. In the same paragraph 23, at page 14, MMB says "Werlinger confirmed that it was his voluntary decision not to use the authorized Bay City site, and he ultimately admitted that Chameleon voluntarily abandoned the Bay City site." Again, this is not true. At the hearing, Mr. Werlinger was very clear in his statements regarding his understanding of Chameleon's responsibilities both under terms of the sales agreement and the lease back agreement with Landrum. Tr. 128-130. Chameleon announced its



intentions to make the proposed STA site its permanent location in its first filing on April

21. Exhibit I, Appendix 3, p.4.

25. MMB PFC at paragraphs 26 and 27, pp 16-17 seeks to minimize the similarities between the KVCi STA and the KFCC STA by pointing to two differences, first that the KVCi STA did not reference loss of the station's site and second that KVCi sought a waiver of the city grade coverage rule.

26. Chameleon's position on the KVCi vs KFCC STA's was fully developed in Chameleon's PFCs; however, it should again noted here that the crux of matter isn't the differences between the way the two STA applications were written, but the incredible difference in the way the MMB has treated the two licensees. The different treatment received by the licensee of KVCi, especially the treatment received between March, 1996 and May, 1997, clearly demonstrates the MMB treats different licensees differently depending upon the attitudes of individuals within the MMB toward the licensee. By way of reference, a check with KVCi on Friday, May 15, 1997 revealed the station *continues to operate on STA* (emphasis added) while providing no city grade coverage to its city of license, Mineola, Texas. If in May, 1997 it is acceptable to grant KVCi such authority, why not KFCC? These two cases make it clear that Commission staff arbitrarily applies policy at their whim.

27. At MMB PFC, footnote 11 on page 17, MMB states that the KVCi STA was terminated, "in part because the staff determined that the licensee had not, for reasons beyond its control, lost its authorized site." This is not the whole story. MMB is engaged in obfuscation when it does not inform the Court that the STA was *reinstated* (emphasis

added) in March, 1996 and continues to date. The MMB is withholding material information from the Court in this and other such references when it does not tell the whole story! It is attempting to deceive the Court into thinking that the STA was terminated and never reinstated. The MMB is giving the Court only the information that promotes its point of view. Clearly, this is a lack of candor on the part of the MMB. Again, the MMB seeks to have it both ways, accusing a licensee of lack of candor while preserving for itself the right not to be completely forthcoming.

#### Chameleon's Reply to MMB's III. Conclusions of Law

28. At MMB PFC, paragraph 4, p 21, the MMB states Chameleon's claim of having lost its site at Bay City "was false." This conclusion is in error. It is true that Chameleon purchased KFCC with the intent of relocating the station's city of license to a community nearer the Houston market. However, such intentions violated no rule or regulation. And, the fact that Chameleon voluntarily first negotiated and then entered into a contract for sale as well as a sublease back to Landrum which contractually obligated Chameleon to leave the site upon consummation of the sale doesn't change the fact that once the sale was consummated and the sublease signed, Chameleon was obligated to leave the site which it did. Thus, the MMB's claim that Chameleon knowingly made false statements regarding the matter are simply not true.

29. At MMB PFC, paragraphs 7-11, pp 23-26, Chameleon's involvement in the construction of the nonbroadcast communications tower at the Harris County site on May 1, 1995 have been fully explained to the court during this proceeding. Confronted with a staff member whose understanding of Division policy has now been demonstrated to be

in error, Chameleon took action to conform with and comply with that staff member's mistaken beliefs. Construction of the nonbroadcast tower required no authority from the MMB. Its construction complied with Mr. Vu's stated yet mistaken understanding of what was a vague and general policy which could be misused by Division staff in a variety of ways to further whatever position it decides to take in any given case.

30. Finally, at MMB PFC, paragraphs 12-15, pp 26-29, the MMB's characterizations of Mr. Werlinger as an individual who cannot be trusted to be a licensee are arbitrary, self-serving and in contradiction of the record. The record is clear as to what Mr. Werlinger did in the instant case and why he took those actions. In preparing the STA request in April, 1995, he made no attempt to deceive the Division's staff. In preparing the STA request, Werlinger was simply following precedent established in other cases in which he was intimately involved.

31. Once a controversy developed, Mr. Werlinger demonstrated his forthrightness in numerous trips to Washington where he met with members of the Commission's staff following the chain of authority up to the highest levels. Eventually, he met with staff members of all the commissioners. Mr. Werlinger made himself available in person to answer questions and attempted to bring the controversy to a conclusion. But for the efforts of one individual within the Bureau, James Burtles, his efforts would have resulted in a resolution of the issues and made unnecessary the instant proceeding.

32. Chameleon was also prompt in seeking authority to make the STA site a permanent licensed location. It announced those intentions in its first filing for STA and it produced within 90 days of the grant of the STA a form 301 application seeking such

authority. That application was determined to meet technical standards and promptly granted cutoff status.

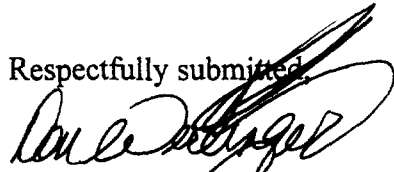
33. Indeed, Mr. Werlinger's more than a quarter of a century history in the broadcast industry shows no proclivity toward disobedience of the Commission's rules and regulations, just the opposite. No evidence of any history of rules violations on the part of Mr. Werlinger was presented by the MMB in this case because no such history exists. In contrast, a review of the licenses held by Mr. Werlinger through the years shows a history of exceptional community service and of upholding the public trust placed in licensees.

34. In sum, Chameleon's "lack of candor" can be distilled down to a typing error on an STA request. No one can look at the record and conclude that either Chameleon or Mr. Werlinger intentionally set out to deceive the Commission. Relying on previous experience, Chameleon sought to make use of authority it knew from that experience was routinely granted. Chameleon never attempted to hide the fact that it intended to serve communities outside the Bay City area. It never attempted to hide the fact that it intended to relicense the station to a community nearer the clients it had served on KENR. In light of this, it would have been irresponsible and foolish from a financial point of view to have entered into an agreement or series of agreements which would have required it to maintain a transmitter site in Bay City. Chameleon entered into a series of agreements, a part of which required it to move from the Bay City site.

Conclusion

35. The MMB has failed in its PFCs to produce an argument which would result in a finding for the MMB in this matter. The evidence in the case points only to the conclusion that Chameleon should retain its license to operate KFCC and the MMB should be directed to grant Chameleon construction permit (BP-950804AC).

Respectfully submitted,



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